

# Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard

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## I. INTRODUCTION

"Capital punishment," Robert Sherrill tells us, "is very popular all over the country. . . ."<sup>1</sup> Whether the Supreme Court is empowered to curtail the people's right to govern death penalties therefore presents a constitutional issue of grave importance. Instead of meeting the issue in a style befitting a "philosopher,"<sup>2</sup> Hugo Bedau's book review<sup>3</sup> of my *Death Penalties*<sup>4</sup> consists of a propagandistic diatribe. Let me begin by dispelling his *ad hominem* fog.

Bedau long has been a crusader for the abolition of death penalties; for fifteen or more years he has maintained an incessant barrage of books and articles promoting his cause, virtually making that his career.<sup>5</sup> Patently he has a heavy investment in the field<sup>6</sup> which, he fears, is threatened by my book.<sup>7</sup> His passionate commitment leads him "to hope" that what Berger "wants" is "to bring about 'a spate of executions . . . without parallel in this Nation since the depression era.'"<sup>8</sup> This "philosopher,"<sup>9</sup> so patently lacking in scholarly detachment, has the gall to label my reference to the murder of policemen in the streets as "waving the bloody flag!"<sup>10</sup> What I have "wanted" throughout my career is to secure the Constitution from erosion.<sup>11</sup>

When Thomas Huxley took up the cudgels for Charles Darwin, he said, "My colleagues have learned to respect nothing but evidence, and to believe that their

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1. Sherrill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, (Magazine), at 80; see *infra* text accompanying note 21. Another opponent of death penalties, D.A. J. Richards, recognizes "the retributive thirst of the American public." Richards, Book Review, 71 CALIF. L. REV. 1372, 1397 (1983).

2. Hugo A. Bedau teaches philosophy at Tufts University.

3. Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152 (1983).

4. R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982).

5. See, e.g., H. BEDAU, *THE DEATH PENALTY IN AMERICA* (2d ed. 1968); H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* (1977).

6. As Leonard Silk noted, "[P]eople have very strong vested interests in ideas that they have already mastered and have written articles and books about." Silk, *Getting Back to Real World*, N.Y. Times, Nov. 16, 1983, at D2, col. 1.

7. "I tip my hat to [Berger] for having delivered himself of an uncompromising argument that will surely help state courts, state legislatures, and others to bring about 'a spate of executions. . . .'" Bedau, *supra* note 3, at 1165.

8. *Id.*

9. Irwin Edman, professor of philosophy at Columbia University, remarked on "the profound difference between being a philosopher and being a professor of philosophy. . . . [I]t is possible, even likely, that one will 'teach' philosophy without acquiring the philosophical habit of mind." I. EDMAN, *PHILOSOPHER'S HOLIDAY* 147 (1938).

10. Bedau, *supra* note 3, at 1156. Consider Bedau's statement that "Berger pauses to disassociate himself from some of his more obvious political allies . . . those who enlist in 'the Helms-Falwell causes,'" *id.* at 1164, genteelly smearing me with the "bedfellow" argument. But "what makes a thing true," Sidney Hook states, "is not who says it, but the evidence for it." S. HOOK, *PHILOSOPHY AND PUBLIC POLICY* 121 (1980). I am not engaged in a political campaign but in ascertaining the historical facts.

11. See *infra* text accompanying notes 157-58.

highest duty lies in submitting to it, however it may jar against their inclinations."<sup>12</sup> Respect for scholarship rests on confidence that scholarly studies are disinterested, a postulate that is simply beyond Bedau's comprehension. He devotes the last two of his fourteen pages to upbraiding me for not disclosing my views as to the desirability of death penalties, an omission he finds "curious and unacceptable."<sup>13</sup> He deplores the "conspicuous" absence from my book of "any pathos,<sup>14</sup> . . . any evidence of concern over the nation's plight as it faces the unprecedented and really unbelievable prospect of a *thousand* lawful executions."<sup>15</sup> He cannot conceive that a dispassionate inquiry into the meaning of constitutional terms adopted in 1789 cannot allow present moral outrage to color the investigation. More than forty years ago I liked it no better when Justice Black embodied *my* predilections in the Constitution than when the Four Horsemen incorporated theirs.<sup>16</sup> From that position I have never wavered.

Whether I am for or against death penalties is altogether without relevance to my inquiry into the meaning of the "cruel and unusual punishments" clause of the eighth amendment. Bedau concedes that "[n]one of these [arguments on the merits of death penalties] has *any* relevance to [Berger's] chosen theme, as he defines it. Rather, the true purpose of this book seems to be to let the death penalty issue serve as a threshing ground from which Berger can extract anew his theory of the Constitution. . . ."<sup>17</sup> His grievance, therefore, is that I proffered still another case study demonstrating the Court's arrogation of power withheld. Bedau is welcome to ride his hobby horse, but he cannot be heard to complain because I chose my own field of study.<sup>18</sup> To quote Bedau, "Whatever Berger's stance may be on the death penalty, none of his arguments or the truth of any of his assertions in this book is thereby put in jeopardy."<sup>19</sup>

Unlike Bedau, I do not make my morals the measure of constitutionality; I do not seek to cram them down the throats of a people who,<sup>20</sup> as he recognizes, cling to

12. T. HUXLEY, *MAN'S PLACE IN NATURE* (1863), *quoted in* H. SMITH, *MAN AND HIS GODS* 372 (1953). As said by Samuel Johnson, "[T]he most obstinate incredulity may be shamed or silenced by the facts." J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 107 (mod. lib. ed. 1952).

13. Bedau, *supra* note 3, at 1164.

14. Flaubert observed that "personal sympathy, genuine emotion, twitching nerves and tear-filled eyes only impair the sharpness of the artist's vision." 4 A. HAUSER, *THE SOCIAL HISTORY OF ART* 76 (1958). "To get at [the truth of our system of morality (and equally of the law)]," said Justice Holmes, "it is useful to omit the emotion and ask ourselves [how far] those generalizations . . . are confirmed by fact accurately ascertained." O. HOLMES, *COLLECTED LEGAL PAPERS* 306 (1920).

Jacques Barzun writes that today "[t]he criminal is more pitied and helped than the victim." J. BARZUN, *A STROLL WITH WILLIAM JAMES* 251 (1983). Robert Sherrill reports that "Florida's death row is populated with scores of fellows who, if anyone deserves to die, certainly seem to: mass murderers, murderers who killed habitually, who killed for fun, who killed for hire, murderers who raped and tortured women, who raped and tortured children." Sherrill, *supra* note 1, at 81.

15. Bedau, *supra* note 3, at 1165.

16. See Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1942).

17. Bedau, *supra* note 3, at 1154.

18. Bedau wrote of my book, its "true purpose" is to "extract anew his theory of the Constitution. . . . In which case, to quarrel with him over any substantive aspects of the death penalty is to verge constantly on the irrelevant, because doing so would misinterpret or misrepresent his true purpose." *Id.*

19. *Id.* at 1165.

20. Bedau recalls Crane Brinton's comment on Robespierre: "If Frenchmen would not be free and virtuous voluntarily, then [Robespierre] would force them to be free and cram virtue down their throats." 2 C. BRINTON, J. CHRISTOPHER & R. WOLFF, *A HISTORY OF CIVILIZATION* 115 (1955). However, as Leonard White observed, "[T]he freedom not to have reform imposed . . . is an element of the system . . . which we cherish." L. WHITE, *THE STATES AND THE NATION* 47-48 (1953).

death penalties.<sup>21</sup> Observing that the people favor capital punishment, I inquired whether the "cruel and unusual" punishments clause barred them from enacting such penalties. When Bedau charges me with lack of candor in concealing my views respecting the morality of death penalties,<sup>22</sup> he implies that my prejudices swayed my constitutional analysis. In contrast to Bedau, however, I have not made a career of arguing the merits of death penalties; in truth, I had been absorbed in other studies and first approached the problem when I began my study of the "cruel and unusual" punishments clause. Soon I came across what Bedau describes as "the great empirical and moral controversies that rage whenever the death penalty is under thorough review."<sup>23</sup> I therefore eschewed a plunge into what he labels "the turbid waters of the deterrent effect of criminal penalties or the relative merits of a retributive versus a utilitarian theory of punishment,"<sup>24</sup> particularly since a number of the Justices found that despite the long debate, the evidence gathered on these issues was inconclusive.<sup>25</sup>

Bedau's tattoo on the "unbelievable prospect of a *thousand* lawful executions"<sup>26</sup> exhibits sheer effrontery. Last year, he notes, "only two executions actually took place," but "well over a thousand [people] are under sentence of death."<sup>27</sup> This "death row logjam" is due to the indefatigable labors of his ally, an affiliate of the NAACP, which played the leading role "in developing the litigational strategy against the death penalty,"<sup>28</sup> appearing in every corner of the country, devising all manner of appellate strategies to postpone executions, so that many have been delayed for as long as ten years.<sup>29</sup> Bedau exulted that *Gregg v. Georgia*<sup>30</sup> "opened up for defense lawyers" a "virgin field of argument . . . new possibilities that with imaginative and resourceful litigation may avoid or nullify many death sentences. . . . [There is] "new hope in cases where the defendant's guilt is beyond doubt."<sup>31</sup> Where is Bedau's "pathos" for the innocent victims?<sup>32</sup> Having helped to make the field an "obstacle course," a "gauntlet"<sup>33</sup> which every conviction of an

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21. In 1975 Bedau wrote, "[T]he public pulse, as measured by all the opinion polls of the past few years, indicates that the American people still want the death penalty, and that all the evidence and arguments against it . . . have not significantly changed this attitude." H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 102 (1977).

22. Bedau, *supra* note 3, at 1164.

23. *Id.* at 1154.

24. *Id.*

25. For citations and quotations, see R. BERGER *supra* note 4, at 127.

26. Bedau, *supra* note 3, at 1165.

27. *Id.* at 1152.

28. *Id.* at 1164-65 n.46.

29. H. BEDAU, *supra* note 21, at 83-84.

30. 428 U.S. 153 (1976).

31. H. BEDAU, *supra* note 21, at 116. Justice Rehnquist rightly charged that the Court has "made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes," and that "the existence of the death penalty in this country is virtually an illusion" due to "endlessly drawnout legal proceedings." *Coleman v. Balkcom*, 451 U.S. 949, 957-59 (1981) (Rehnquist, J., dissenting). Apparently, however, the wind is shifting. According to Linda Greenhouse, who reports on the Court for the *New York Times*, a majority of the Justices view "the lower courts as too willing to allow death penalty appeals to drag on [and] too malleable in the hands of creative lawyers who devise ever more stumbling blocks to the carrying out of sentences." Greenhouse, *A New, Angrier Mood on Death Penalty Appeals*, N.Y. Times, Nov. 11, 1983, A22, col. 3. "A majority [of the Court] is now determined to shorten the path from death sentence to execution and is reaching out for cases with which to convey that message." *Id.*

32. See J. BARZUN, *supra* note 14.

33. The quotation marks are Bedau's, as if he questions the reality of the "obstacle course" and "gauntlet." Bedau, *supra* note 3, at 1154.

undoubted murderer must now run, having created a death row logjam, Bedau now sheds crocodile tears over the "unbelievable prospect of a *thousand* lawful executions."

My thesis, as Bedau recounts, is that "[c]ontrol of death penalties . . . was left by the Constitution to the States," so that since 1972 the Court "has been acting 'unconstitutionally' . . . ." <sup>34</sup> Citing Granucci, Bedau misleadingly paraphrases my alleged view that the "history of the 'cruel and unusual punishments' clause . . . has *hitherto been misunderstood*." <sup>35</sup> "Hitherto misunderstood" implies that contrary to my view, the phrase has long been understood to bar death penalties, whereas that understanding first surfaced in the late 1960s. Granucci was a young law school graduate whose 1969 "historical" study is avidly cited by abolitionists. <sup>36</sup> Disposing of his "history" was child's play, as the reader can quickly discover on reading my detailed analysis of his article. <sup>37</sup> Does Bedau take account of my rebuttal, as is incumbent upon a scholar? <sup>38</sup> Of course not; facts are of no moment to a philosopher turned propagandist. To resume Bedau's summary of my position, the rulings in the recent cases "represent a blatant perversion of the 'cruel and unusual punishments' clause. . . ." <sup>39</sup> This can be demonstrated by Bedau's own words.

"Undeniably," he writes, capital punishment was not "deemed among the 'cruel and unusual punishments' by those who deliberately chose this phrase to express what they wished to prohibit." <sup>40</sup> His "undeniably" is well-founded. Justice James Wilson, second only to Madison as an architect of the Constitution, said in his 1791 lectures, "[T]he crime of wilful and premeditated murder is and has been punished with death. Indeed it seems agreed by all, that, if a capital punishment ought to be inflicted for any crimes, this is unquestionably a crime for which it ought to be inflicted." <sup>41</sup> In 1976 Bedau wrote, "Until fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law." <sup>42</sup> "[S]ave for a few eccentrics and visionaries," he remarked, the death penalty was "taken for granted by all men . . . as a bulwark of social order. . . ." <sup>43</sup> For 300 years, from 1689 when the

34. Bedau, *supra* note 3, at 1153; see *infra* text accompanying notes 40-48.

35. Bedau, *supra* note 3, at 1153 (emphasis added).

36. *Id.* at 1153 n.13. Granucci, I mentioned, had just graduated from law school, and I noted that Justice Marshall had titled him "Professor." *Furman v. Georgia*, 408 U.S. 238, 319 n.14 (1972) (Marshall, J., concurring). Bedau reports that Berger was erroneously described by a columnist as "retired Harvard Law Professor," and that "Berger is presumably no more responsible for his implied promotion than was Granucci." *Id.* Bedau completely misses the point: Granucci's "promotion" was not Granucci's responsibility but Marshall's elevation of Granucci to lend his history credibility.

37. R. BERGER, *supra* note 4, at 30-43. My painstaking analysis of this youthful work is an earnest of my commitment to *proof* as distinguished from Bedau's frequent bare assertions.

38. A scholar should comment on discrepant evidence and opposing inferences. H. BUTTERFIELD, *GEORGE III AND THE HISTORIANS* 225 (1959).

39. Bedau, *supra* note 3, at 1154 (quoting R. BERGER, *supra* note 4, at 180).

40. *Id.* at 1162. In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Blackmun observed, "The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment." *Id.* at 407 (Blackmun, J., dissenting). It cannot be controverted that, as Chief Justice Burger stated, "[i]n the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment." *Id.* at 380 (Burger, C.J., dissenting).

41. 2 THE WORKS OF JAMES WILSON 661 (R. McCloskey ed. 1967).

42. H. BEDAU, *supra* note 21, at 118.

43. *Id.* at 12.

English Bill of Rights first employed "cruel and unusual punishments," through 1789 when "cruel and unusual punishments" was embodied in our own Bill of Rights, until 1972 when the Court at long last discovered that the phrase curtailed the right to punish by death, such penalties had been employed without demur.<sup>44</sup> Before that "discovery,"<sup>45</sup> Bedau stated, "[n]o death sentence had ever been voided as a violation of due process, equal protection or on any other ground."<sup>46</sup> To borrow from the Court's 1983 legislative chaplain case, a practice that "has continued without interruption ever since that earliest session of Congress"<sup>47</sup> cannot be deemed a "cruel and unusual punishment." Bedau correctly summarized the historical record:

[Death penalties] are not unconstitutional under the Eighth Amendment because however cruel and unusual they may now be, they are *not more* "cruel" and *not more* "unusual" than those that prevailed in England and the Colonies two or three hundred years ago. An unbroken line of interpreters has held that it was the original understanding and intent of the framers of the Eighth Amendment . . . to proscribe as "cruel and unusual" *only* such modes of execution as compound the simple infliction of death with added cruelties or indignities.<sup>48</sup>

Bedau taxes me, however, with what he considers the Achilles heel of my book—failure to state what "meaning" the Framers attached to the phrase "cruel and unusual punishments."<sup>49</sup> One can understand a philosopher's longing for a comprehensive generalization; but the genius of the common law has been pragmatic, proceeding from case to case, content to decide the immediate issue. It is unnecessary in this legal context to launch upon a search for an inclusive definition, because whatever the words may "mean," *one thing incontrovertibly they did not mean*—death penalties unaccompanied by added cruelties. So it was understood by the Framers, as Bedau concedes: their "intent" was "to proscribe as 'cruel and unusual' *only* such modes of execution as compound the simple infliction of death with added cruelties."<sup>50</sup> Sanford Levinson, an opponent of death penalties, considers it a "dev-

44. See *McGautha v. California*, 402 U.S. 183, 197–208 (1971) (reviewing the history of capital punishment and holding that the Constitution is not violated when a jury imposes the death penalty), overruled 14 months later by *Furman v. Georgia*, 408 U.S. 238 (1972).

45. Concurring in *Green v. United States*, 356 U.S. 165 (1958), Justice Frankfurter rejected the assumption that "everybody on the Court has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated," adding, "It is not for this Court to fashion a wholly novel constitutional doctrine . . . in the teeth of an unbroken legislative and judicial history from the foundation of the Nation." *Id.* at 192–93 (Frankfurter, J., concurring).

46. H. BEDAU, *supra* note 21, at 81.

47. *Marsh v. Chambers*, 103 S. Ct. 3330, 3334 (1983). Justice Story remarked in a similar case, "[S]uch long acquiescence in [the death penalty], such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would . . . entitle the question to be considered at rest." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 621 (1842). "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the Founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, *fixes the construction* to be given its provisions." *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928) (emphasis added); see also *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). Such cases, I submit, are conclusive on what Bedau considers the "main issue, . . . whether [the] absence of evidence [?] [of the Framers' intention] to apply the provisions of 'cruel and unusual punishments' . . . is *conclusive* for later judicial interpretation of these phrases." Bedau, *supra* note 3, at 1159. Nowhere does Bedau point out a provision of the Constitution that authorizes the Court to revise the instrument. On the contrary, John Marshall wrote that the Court is not authorized to "change" the Constitution. JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 209 (G. Gunther ed. 1969).

48. H. BEDAU, *supra* note 21, at 35 (emphasis in original).

49. Bedau, *supra* note 3, at 1161.

50. See *supra* text accompanying note 48.

astating problem” that “both the Fifth and Fourteenth Amendments specifically acknowledge the possibility of a death penalty. They require only that due process of law be followed before a person can be deprived of life.”<sup>51</sup> Moreover, the very same framers enacted the Act of 1790 which made murder and robbery, among other crimes, punishable by death; to safeguard the penalty, the Act prohibited resort to “benefit of clergy” as an exemption from capital punishment.<sup>52</sup> Whatever “cruel and unusual punishments” may include, one thing incontestably it did not include: death penalties for murder.

## II. BEDAU’S COUNTERARGUMENTS

### A. *The Remarks of Smith and Livermore*

Bedau reproaches me for underrating the remarks of William Smith and Samuel Livermore,

the single most famous comment squarely in point on “the original understanding” by the Framers and Ratifiers of what *they* meant by the “cruel and unusual punishments” clause. . . . Smith objected to the clause as “too indefinite” and Livermore complained, “[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future to be prevented from inflicting these punishments because they are cruel?”<sup>53</sup>

Livermore’s utterance strikes Bedau “as effective public *notice for those who favored adoption* of the clause that ‘in future’ someone [perhaps the Supreme Court] might conclude that corporal or capital punishments as such are ‘cruel and unusual’ in the very sense of those terms then under debate.”<sup>54</sup> Thus, he would saddle the proponents of the clause with views that they rejected; despite the Smith-Livermore objections, the proponents adopted the clause, thereby repudiating Smith’s claim that it was “too indefinite” and Livermore’s objection that it authorized future curtailment of death penalties.

Bedau dismisses my comment that the Smith-Livermore objections

lack “any weight” because they came from persons who voted in opposition to adopting the clause, and “established canons” require us to discount entirely the views of opponents to a measure in any effort to divine what its proponents meant by it. This “canon” is sensible enough, but its use here is a bit ham-handed, since to ignore the Smith-Livermore remarks is to ignore *everything* that was said in Congressional debate and thereby obscure the point above about public notice.<sup>55</sup>

Apparently Bedau doubts the existence of “established canons,” but the Court has declared that

51. Levinson, *Wrong But Legal?*, THE NATION, Feb. 26, 1983, at 248.

52. Act of April 30, 1790, ch. 9, §§ 3, 31, 1 Stat. 112, 115, 119 (1790). This exemption was first afforded to the clergy and then to those of the laity who could read. M. RADIN, ANGLO-AMERICAN LEGAL HISTORY 230-31 (1936).

53. Bedau, *supra* note 3, at 1159 (quoting 1 ANNALS OF CONG. 782-83 (1789)).

54. *Id.* at 1159-60 (emphasis added).

55. *Id.* at 1160.

[remarks] made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. . . . This is especially so with regard to the statements of legislative opponents who "[i]n their zeal to defeat a bill . . . understandably tend to *overstate its reach*."'<sup>56</sup>

In other words, "[a]n unsuccessful minority cannot put words into the mouths of the majority."<sup>57</sup> To insist that the case is different because the utterance constitutes "public notice" to the proponents is to jettison the canon, for every opponent's remark gives such notice. Livermore spoke for himself, not for the Framers.

Another canon speaks against Bedau's reliance on Livermore. The Framers chose words of settled meaning—"undeniably" they were inapplicable to death penalties—that could not be curtailed by Livermore's "single" utterance. Doubtless the Framers were aware of the long settled rule of construction summarized in Matthew Bacon's *A New Abridgment of the Law*: "If a Statute make use of a Word the Meaning of which is well known at the Common Law, the Word shall be understood in the same Sense it was understood at the Common Law."<sup>58</sup> Chief Justice Marshall applied the rule in *Gibbons v. Ogden*,<sup>59</sup> stating that if a word was understood in a certain sense "when the Constitution was framed . . . [t]he convention *must have used the word in that sense*,"<sup>60</sup> and it is that sense which is to be given effect. Marshall's inference may be regarded as a *presumption*. Bedau's argument that because "[t]he 'Framers and Ratifiers' chose to formulate their prohibition in general and 'indefinite terms,' . . . they must be *presumed* to have intended the semantic consequences of this act"<sup>61</sup> runs afoul of Marshall's presumption to the contrary. As Justice Story stated, given the Framers' employment of a common law term, the common law definitions "are necessarily included, as much as if they stood in the text of the [Constitution]."<sup>62</sup>

## B. The Meaning of "Meaning"

Bedau argues,

[B]y far the most important, [Berger] insists that incorporation elsewhere in the Bill of Rights of references to penalties of death and the enactment of 1790 of federal capital statutes shows conclusively that the Founders "contemplated" the death penalty, acted on "the premise that one may be deprived of life," and believed that Congress had "the right to impose death penalties." No doubt all this is true, as far as it goes. But how far *does* it go?<sup>63</sup>

56. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976) (emphasis added) (brackets in original) (quoting *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964)).

57. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956).

58. 4 M. BACON, A NEW ABRIDGEMENT OF THE LAW (1)(4)(29) (3d ed. 1768) (under "Statute").

59. 22 U.S. (9 Wheat.) 1 (1824).

60. *Id.* at 190 (emphasis added); see also *Thompson v. Utah*, 170 U.S. 343 (1898). "[T]he words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument." *Id.* at 350.

61. Bedau, *supra* note 3, at 1162 (emphasis added).

62. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820).

63. Bedau, *supra* note 3, at 1160.

Bedau's principal objection is that Berger "nowhere states what that 'known, unalterable' meaning is."<sup>64</sup> By Bedau's own testimony, the Framers excluded death penalties unaccompanied by other cruelties from the "cruel and unusual" punishments clause; this much the clause indubitably "meant." Anglo-American law never has waited for development of an overarching principle before deciding a particular case. Suffice it that the Framers clearly manifested their intention to exempt death penalties from the "cruel and unusual" punishments clause.

To reduce my argument to absurdity, Bedau seizes on my demonstration that disembowelment "could not have been prohibited in England during the eighteenth century as a 'cruel and unusual punishment', as that phrase was understood in the English Bill of Rights of 1689, since Parliament did not see fit to abolish this mode of inflicting the death penalty until 1814."<sup>65</sup> Bedau disposes of the matter by resort to speculation: "Berger does not even mention the possibility that between 1689 and 1814, Parliament had embraced a tacit contradiction, [so what?] or that Parliament presumably thought such a contradiction could be avoided by implicit appeal to the 'necessity' or 'proportionality' of what . . . is a 'horrible' punishment."<sup>66</sup> A Bedau authority, Granucci,<sup>67</sup> notes the continuance after 1689 of "all the barbarities. . . . Executing male rebels by drawing and quartering continued with all its embellishments until 1814, when disembowelling was eliminated by statute."<sup>68</sup> Speculation about Parliament's motivation is unnecessary, for the Lord Chancellor explained: "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, . . . we took the view that it was a punishment *no longer consistent with our own self-respect*."<sup>69</sup> Thus, disembowelment was not judicially outlawed even though it was extremely cruel; rather an Act of Parliament was required to end it. As a clincher, Bedau adds, suppose that "Congress in 1800 had enacted a federal death penalty of disembowelment for the crime of treason. Would that have been consistent with the eighth amendment so recently adopted?"<sup>70</sup> Again Bedau imposes his present outrage on the common law that was the frame of the Founders' endeavors.

The Framers were well aware, in the words of James Wilson, that "numerous and dangerous excrescences" had disfigured the English law of treason,<sup>71</sup> and they

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64. *Id.*

65. *Id.* at 1160-61 n.42.

66. *Id.* Bedau would cast doubt on my objection "that there is no warrant for supposing that disproportionality was a concept implicit in the original understanding of any punishments judged to be 'cruel and unusual.'" *Id.* at 1161 (quoting R. BERGER, *supra* note 4, at 41). Boiling in oil was revolting rather than "disproportionate." The mere existence of a death penalty for theft of a few shillings defeats the argument that "disproportionality" is implicit in "cruel and unusual." As late as 1813, Lord Ellenborough inveighed against repeal of that penalty. *Furman v. Georgia*, 408 U.S. 238, 246 n.9 (1972) (Douglas, J., concurring). Bedau himself wrote in 1968 that "even if the death penalty were imposed by statute for a trifling offense, it is doubtful that it would be 'cruel and unusual' according to the 'original understanding.'" H. BEDAU, *supra* note 21, at 35. What, besides wishful thinking, led Bedau to change his mind?

67. Bedau, *supra* note 3, at 1153 n.13.

68. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 855-56, 862 (1969). Bedau himself notes the entry of a sentence of disembowelment in 1812. H. BEDAU, *THE DEATH PENALTY IN AMERICA* 3 (1967).

69. 268 PARL. DEB., H.L. (5th ser.) 703 (1965) (emphasis added).

70. Bedau, *supra* note 3, at 1160-61 n.42.

71. 2 THE WORKS OF JAMES WILSON 54-55 (R. McCloskey ed. 1967).



delimited and defined it,<sup>72</sup> thereby putting it beyond the power of Congress to employ the English definitions respecting the *scope* of treason. They also banned the related bill of attainder and corruption of blood.<sup>73</sup> These measures evidenced a belief that in the absence of express repudiation, the common law would govern.<sup>74</sup> Moreover, the Constitution provided that "Congress shall have power to declare the punishment for treason,"<sup>75</sup> a plenary grant not diminished by our contemporary morals.<sup>76</sup> Presumably, in 1800 Congress shared Parliament's view that disembowelment was not "consistent with our self-respect," and did not adopt such punishments. That, however, does not confess lack of power to do so.

The Marshall-Story canon negates yet another Bedau argument. Bedau argues: "Prior to the discovery of Australia, no European had seen a black swan; hence 'swan' was used always and only to refer to a certain class of white water fowl. . . . Clearly, the *reference* of the term, 'swan' no longer remained the same. . . . [S]wans included both black and white fowl."<sup>77</sup> But, he continues, the "*meaning* of the term" did not change; ornithologists merely "widened the original reference class without changing the term's meaning." The "widening," as Bedau notes, proceeded from basic "structural" and other similarities, the "property of color [being] incidental."<sup>78</sup> "Death penalties are valid," however, is the very opposite of "death penalties are forbidden;" "structural" similarities are absent, and, unlike black "color," death is not "incidental" but is of the essence.<sup>79</sup> Bedau is also oblivious to the difference between an ornithologist's classification and a constitutional term. No constraints prevent the former from reclassifying a datum; but the Constitution was framed by a people fearful of power which they defined and limited<sup>80</sup> so that, in Jefferson's words, their delegates would be bound down from "mischief by the chains of the Constitution."<sup>81</sup> Those chains were fashioned out of words, and in the case of common law terms their definitions were incorporated in the Constitution's text. Hence, to change the original meaning is to dissolve the bonds. It is therefore not merely "swans" that are in issue but, to pursue Bedau's analogy, it is as if "white swans" were the then accepted constitutional definition. To change the meaning to "black and white swans" manifestly revises the "definition" of that term and

72. See U.S. CONST. art. III, § 3, cl. 1.

73. *Id.* art. I, § 9, cl. 3.

74. Additionally, the Framers prohibited recourse to "benefit of clergy." See M. RADIN, *supra* note 52, at 230-31.

75. U.S. CONST. art. III, § 3, cl. 2.

76. Justice Holmes stated that the "Court always had disavowed the right to intrude its judgment upon questions of policy or morals." *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting) (5-4 decision). Justice Brandeis joined in Holmes' dissenting opinion in *Hammer*.

77. Bedau, *supra* note 3, at 1162.

78. *Id.*

79. Thomas Aquinas wrote, "[W]hat is accidental to the nature of the object of a power does not differentiate that power." J. BARZUN, *supra* note 14, at 304.

80. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall asked, "To what purpose are powers limited . . . if these limits may, at any time, be passed by those intended to be restrained?" *Id.* at 176. He also declared that if the Constitution is not "unchangeable by ordinary means[,] . . . then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." *Id.* at 177.

81. 4 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 543 (2d ed. 1836).

destroys the limits on the delegation.<sup>82</sup> Then too, the delegations were made by Founders jealously guarding rights reserved to the states.<sup>83</sup> To expand the scope of the delegation is to invade that reservation. It "has long been recognized," said the Warren Court, "as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice."<sup>84</sup> Reservation of that "latitude" was speedily secured by the tenth amendment; the reservation, the Court stated, was made "absolutely certain by the Tenth Amendment, [to] forestall federal exercise" of power which had not been granted.<sup>85</sup> An intention to cut down those reserved powers must be clearly expressed,<sup>86</sup> not supplied as in Bedau's ornithological analogy.

The juiciest plum Bedau plucks from the cake is that "no general term . . . in 1789 or today, ever *means* the things to which it *refers*. For at least a century, philosophers have been explaining this lesson to all who will listen and think."<sup>87</sup> His authority is an 1892 essay by Gustav Frege, who championed a "platonistic theory of meanings as abstract entities"<sup>88</sup>—Plato's "idea" of a chair, rather than the physical object, represented "reality"—a concept rejected by nominalists for these many centuries. A contemporary philosopher, Ludwig Wittgenstein, admonished, "Don't ask for the meaning, ask for the use."<sup>89</sup> Bedau illustrates the distinction between "meaning" and "reference" by comparing "'trilateral closed plane figure' and 'triangular closed plane figure. . . .' [Both] have the same reference, viz., the same class of geometrical entities; but the meaning of these terms is not the same."<sup>90</sup> All

82. Bedau argues that what "Berger completely overlooks is that it need not be the *words* 'cruel and unusual punishments' that have changed their *meaning* between 1789 and 1972. It can be, rather, that the *thing* in question, capital punishment, has changed its nature. . . . For example, it would be impossible today to argue that the death penalty is 'necessary.'" Bedau, *supra* note 3, at 1163. That emphatically is not the view of the American people who continue to regard death penalties as "necessary." See *Gregg v. Georgia*, 428 U.S. 153, 179 (1976). The four dissenters in *Furman* said,

Before recognizing such an instant evolution in the law, it seems fair to ask what factors have changed that capital punishment should now be 'cruel' in the constitutional sense as it has not been in the past. It is apparent that there has been no change of constitutional significance in the nature of the punishment itself.

*Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

83. For copious citations, see index, "State Sovereignty," R. BERGER, *CONGRESS V. THE SUPREME COURT* 421 (1969). "Opponents of ratification . . . had conjured up the image of a national colossus, destined to swallow up or destroy the defenseless states. To quiet these fears, Madison proposed the Tenth Amendment." Mason, *The Bill of Rights: An Almost Forgotten Appendage*, in *THE FUTURE OF OUR LIBERTIES* 47 (S. Halpern ed. 1982).

84. Hoag v. New Jersey, 356 U.S. 464, 468 (1958). James Wilson, Chairman of the House Judiciary Committee, emphasized during the debates on the Civil Rights Bill, "We are not making a general criminal code for the States." CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866). Felix Frankfurter considered that the fourteenth amendment "is not the basis of a uniform code of criminal procedure federally imposed." F. FRANKFURTER, *LAW AND POLITICS* 192 (1939). "Each State prescribes its own modes of judicial proceeding." *Missouri v. Lewis*, 101 U.S. 22, 31 (1879) (Bradley, J.).

Warren's deeds did not always correspond with his words. Consider, for example, his invasion of states' rights represented by the desegregation decision. See R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117-33 (1977).

85. *Kansas v. Colorado*, 206 U.S. 46, 89-90 (1907).

86. An intention "to establish a principle never before recognized, should be expressed in plain and explicit terms." *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693) (Marshall, C.J.). Justice Miller refused to embrace a construction of the fourteenth amendment that would subject the states' local concerns to "the control of Congress . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872); see also *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

87. Bedau, *supra* note 3, at 1161.

88. *Id.* at 1161 n.43.

89. J. BARZUN, *supra* note 14, at 299.

90. Bedau, *supra* note 3, at 1161 n.43.

this may be most edifying to philosophers, but it has "nothing to do with the case." The Founders clearly tied "meaning" to "reference"—"cruel and unusual," they made abundantly plain, did not *refer* to capital punishment. Since that was the *meaning* they attached to the clause,<sup>91</sup> the courts held (before 1972) that the phrase must judicially be given that effect.<sup>92</sup>

### C. *Federalist No. 78*

To buttress his charge that "Berger is *selective* in his use of primary sources," Bedau cites a passage from *Federalist No. 78*: "The *interpretation* of the laws is the proper and peculiar province of the courts."<sup>93</sup> This, he concludes, devastates my "boast[ed]" disinterestedness, because "it is curious that eight times [Berger] has recourse to the source containing this passage but nowhere bothers to show that he has read and reflected on its possible relevance to his argument." According to Bedau, the passage "seems to stake out room for appellate courts to probe the 'meaning' of both constitutional and statutory language," and "thus moves in the hated [this is satirical] direction of judicial activism."<sup>94</sup> What his discourse discloses is that "a little learning is a dangerous thing." To "interpret" is "to expound the meaning of," to "explain,"<sup>95</sup> *not to make law*. This distinction, deeply rooted in the common law,<sup>96</sup> was a basic presupposition of the Founders, and was plainly shared by Hamilton as some of my "eight" references to *Federalist No. 78* made plain.

Francis Bacon cautioned judges "to remember that their office is . . . to interpret law, and not to make law."<sup>97</sup> Familiarity with that tradition is evidenced by the Framers' rejection of the Justices' participation in a Council of Revision. It had been proposed that the Justices should assist the President in exercising the veto power on the ground that "[l]aws may be . . . unwise, may be dangerous . . . and yet not be so unconstitutional as to justify the Judges in refusing to give them

91. For such identification of "meaning" and "reference," see *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

92. See *supra* text accompanying note 48.

93. Bedau, *supra* note 3, at 1155 (emphasis added) (quoting *THE FEDERALIST* No. 78, at 506 (A. Hamilton) (mod. lib. ed. 1937)).

94. *Id.* at 1155-56.

95. See the definition of "interpret," *OXFORD UNIVERSAL DICTIONARY* (3d ed. 1955). *BOUVIER'S LAW DICTIONARY* 832 (15th ed. 1885) defines "interpretation" as "representation of the true meaning," *i.e.*, "that meaning which those who used them were desirous of expressing."

96. Samuel Thorne tells us that Bracton wrote his treatise in 1250 because judges had been found to "decide cases according to their own will rather than by the authority of the laws." 2 H. BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 19 (S. Thorne trans. 1968).

97. FRANCES BACON, *SELECTED WRITINGS* 138 (mod. lib. ed. 1955). Just before our Revolution, Blackstone condemned "arbitrary judges" whose decisions are "regulated only by their own opinions," and "not by any fundamental principles of law" which "judges are bound to observe." 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 269 (1765). Chief Justice Mansfield stated, "Whatever doubts I may have in my own breast with respect to the policy and expedience of this law . . . I am bound to see it executed according to its meaning." *Pray v. Edie*, 99 Eng. Rep. 1113, 1114 (K.B. 1786). Justice James Wilson observed, "[The judge] will remember, that his duty and his business is, not to make the law, but to interpret and apply it." 2 *THE WORKS OF JAMES WILSON* 502 (R. McCloskey ed. 1967). Chief Justice Waite reiterated, "Our province is to decide what the law is, not to declare what it should be." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874). Later Justice Moody declared, "[Courts] have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written." *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281, 295 (1908).

effect."<sup>98</sup> But Elbridge Gerry objected, "It was quite foreign from the nature of ye office to make them judges of the policy of public measures."<sup>99</sup> Nathaniel Gorham said judges "are not to be presumed to possess any peculiar knowledge of . . . public measures";<sup>100</sup> John Dickinson stated that judges "ought not to be legislators."<sup>101</sup> As Edward Corwin concluded,

The first important step in the clarification of the Convention's ideas with reference to the doctrine of judicial review is marked, therefore, by its rejection of the Council of Revision idea on the basis of the principle . . . [t]hat the power of *making* ought to be distinct from that of *expounding* the law.<sup>102</sup>

Throughout the Convention, the Framers identified the judicial role with "expounding" the law.<sup>103</sup> A leading activist, Charles Black, confirms that for the colonists "[t]he function of the judge was thus placed in sharpest antithesis to that of the legislator," who alone was concerned "with what the law ought to be."<sup>104</sup>

Hamilton clearly viewed the judicial role to be thus limited. In the very same *Federalist No. 78* he rejected the notion that "the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature";<sup>105</sup> that is, courts were confined to preventing legislative action in excess of power granted.<sup>106</sup> Only the people were empowered to "[change] the established form."<sup>107</sup> Hamilton is poor authority for Bedau's expansive theories of "meaning," for he said in *Federalist No. 81*, "The power of construing the laws according to the *spirit* of the Constitution, will enable that Court to mould them into whatever shape it may think proper," a power "as unprecedented as it is dangerous."<sup>108</sup> He assured the Ratifiers that judges could be impeached for "a series of deliberate usurpations on the authority of the legislature."<sup>109</sup> In light of this evidence, it is, I submit, grossly unbecoming for a "philosopher" to charge a fellow scholar with "selective" use of the "primary sources."

#### D. *The Jury's Discretion*

In *McGautha v. California*<sup>110</sup> the Court declared, "[W]e find it quite impossible to say that committing to the untrammelled discretion of the jury power to pronounce life or death in capital cases is offensive to anything in the Constitution."<sup>111</sup> My

98. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 73 (1911).

99. 1 M. FARRAND, *supra* note 98, at 97-98.

100. 2 M. FARRAND, *supra*, note 98, at 73.

101. 1 M. FARRAND, *supra* note 98, at 108.

102. E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS 43-44 (1963).

103. For citations, see index "Expounding the law," R. BERGER, *supra* note 83, at 409.

104. C. BLACK, THE PEOPLE AND THE COURT 160 (1960).

105. THE FEDERALIST No. 78, at 507 (A. Hamilton) (mod. lib. ed. 1937).

106. R. BERGER, *supra* note 83, at 13-16.

107. THE FEDERALIST No. 78, at 509 (A. Hamilton) (mod. lib. ed. 1937).

108. THE FEDERALIST No. 81, at 523 (A. Hamilton) (mod. lib. ed. 1937).

109. *Id.* at 526-27.

110. 402 U.S. 183 (1971).

111. *Id.* at 207. The startling reversal of *McGautha* by *Furman v. Georgia*, 408 U.S. 238 (1972), after the passage of only 14 months, is beneath Bedau's notice. Justice Blackmun observed that the Court was "evidently persuaded that

exploration of the historical materials convinced me that juries did indeed enjoy "untrammelled discretion," and by virtue of the "trial by jury" required by the Constitution, that discretion, an attribute of "trial by jury," was protected by the Constitution.<sup>112</sup>

Against this, Bedau fires a veritable blockbuster: "Berger's use of historical evidence can be inaccurate or worse [fabricated?]," stating categorically, "not one of [Berger's] two dozen or so citations refers to verdicts in *capital* cases."<sup>113</sup> Bedau's unreliability again is demonstrated because three of those cases *were* capital cases.<sup>114</sup> I challenge him to point to *one* case holding that the discretion enjoyed in lesser criminal offenses was barred in capital cases.<sup>115</sup> His attack on discretion in capital cases would rob defendants of the shield afforded by a jury at the point it is most needed, for the jury's discretion has "long been regarded as a bulwark of protection for the criminal defendant"<sup>116</sup> against harsh laws and harsh judges. In fact, discretion was the rule, as one of my "capital" cases, *People v. Garbutt*,<sup>117</sup> evidences. In *Garbutt*, Chief Justice Thomas Cooley, a noted authority on constitutional law, said of an attempt

to surround the jury with arbitrary rules as to the weight they shall allow to evidence [which is at the heart of the Court-imposed "standards,"] . . . no such arbitrary rules are admissible. . . . [T]he jury must be left to weigh the evidence . . . by their own tests. They can not properly be furnished for this purpose with balances which leave them no discretion. . . .<sup>118</sup>

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somehow the passage of time ha[d] taken [the Court] to a place of greater maturity and outlook," though there was "nothing that demonstrate[d] a significant movement of any kind in [those] brief periods." *Furman v. Georgia*, 408 U.S. 238, 408 (1972) (Blackmun, J., dissenting). He expostulated against the "suddenness of the Court's perception of progress in the human attitude [since *McGautha*]," *id.* at 410, a perception the plurality before long was constrained to disavow. In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell, and Stevens acknowledged that the backlash against *Furman v. Georgia* had "undercut" the assumption upon which that decision rested: "it is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction." *Id.* at 179.

112. R. BERGER, *supra* note 4, at 133-39. Bedau, so exquisitely sensitive to every Berger "omission," pointedly ignores that "cruel and unusual punishments" was concerned with the nature of the punishment, not with the *process* by which the jury arrived at its verdict.

113. Bedau, *supra* note 3, at 1156 (emphasis added). The 1958 *Report of the Conference of Chief Justices* observed, "[I]t seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years." REPORT OF THE CONFERENCE OF CHIEF JUSTICES (1958) (reprinted by The Virginia Commission on Constitutional Government). My own studies confirm most of the conclusions there set forth, which I have read only now.

114. *McGautha v. California*, 402 U.S. 183 (1971); *Sparf & Hansen v. United States*, 156 U.S. 51 (1895); *People v. Garbutt*, 17 Mich. 9 (1868); see R. BERGER, *supra* note 4, at 133.

In the course of his guide to advocacy before the Supreme Court, Justice Jackson cautioned the neophyte that "if the first decision cited does not support [the proposition], I conclude the lawyer has a blunderbuss mind and rely on him no further." Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A. J. 801, 804 (1951).

115. In one of my cited cases, *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185 (1855), Chief Justice Lemuel Shaw examined a Massachusetts statute which provided that "in *all* trials for criminal offences, it shall be the duty of the jury . . . to decide at their discretion, by a general verdict." *Id.* at 185 (emphasis added). If there was discretion in capital cases the statute, by Bedau's lights, was fatally defective, yet not a word in an exhaustive opinion notices the point.

116. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 58 (1966). The jury, the authors conclude, represents "an impressive way of building discretion, equity, and flexibility into a legal system." *Id.* at 498.

117. 17 Mich. 9 (1868).

118. *Id.* at 27-28. Much earlier John Adams had written that it is "an absurdity to suppose that the law would oblige them [the jury] to find a verdict according to the direction of the court [*pace* "standards"]", against their own opinion,

Bedau objects that "what we have is [Berger's] attempt to spread onto the modern practice of discretionary sentencing by juries in capital cases the same luster the Founders saw in jury verdicts generally."<sup>119</sup> His emphasis on "sentencing" clouds the issue. The jury that the Founders knew did not "sentence." It rendered a *verdict* of "guilty" upon which the judge entered a *sentence* of death. Death was mandatory, as the Act of April 30, 1790 exemplifies,<sup>120</sup> a mandate beyond the power of judge or jury to alter. But that does not signify that jury discretion was absent. "Discretion" means the power "of acting according to one's judgment: uncontrolled power of disposal."<sup>121</sup> It was open to the jury freely to choose between death and acquittal, a choice no judge could control. Over the years juries reacted unfavorably to the harshness of mandatory death sentences, resulting in "jury nullification" when juries believed the penalty inappropriate.<sup>122</sup> Thus, legislatures were impelled "forthrightly [to grant] juries the discretion which they had been exercising in fact."<sup>123</sup> When legislatures added the alternative of imprisonment to the jury's choice between life and death, they afforded a middle ground, a third option which did not change the nature of "discretion" but merely broadened its scope. To attach the label "sentencing" to these choices in nowise alters the discretion the jury exercised.<sup>124</sup>

#### E. Rape and Racial Discrimination

Bedau approaches the rape issue in his usual muddled fashion: "[Berger] pointedly fails to mention" in dismissing *Coker v. Georgia*<sup>125</sup> that "the history of the death penalty for this crime in our nation . . . shows incontestably that it was used primarily for the punishment of black offenders who raped white victims."<sup>126</sup> It utterly escapes Bedau that instead of adjudicating racially discriminatory rape penalties, the Court wielded a meat-ax to strike down the rape death penalty altogether. A lawyer is hardly to be blamed for focusing on what the Court decided rather than on Bedau's preferred issue. My description that *Coker*, as "a decision that is without

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judgment and conscience." *Sparf & Hansen v. United States*, 156 U.S. 51, 143 (1895) (Gray, J., dissenting) (quoting John Adams). Gray was, therefore, on sound ground in stating, "[T]he jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences." *Id.* at 114.

119. Bedau, *supra* note 3, at 1156.

120. Act of April 30, 1790, ch. 9, § 3, 1 Stat. 112, 113 (1790). At the adoption of the Bill of Rights, "the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses." *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

121. See the definition of "discretion," OXFORD UNIVERSAL DICTIONARY (3d ed. 1955).

122. *Furman v. Georgia*, 408 U.S. 238, 339 (1972) (Marshall, J., concurring). At times, no doubt, the jury allows "feelings of compassion for the prisoner, or of repugnance to the punishment which the law awards" to overpower "their sense of duty. They usurp in such cases the prerogative of mercy. . . ." W. FORSYTH, HISTORY OF TRIAL BY JURY 430 (1852).

123. *McGautha v. California*, 402 U.S. 183, 199 (1971).

124. The "determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury." *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (Douglas, J., concurring).

125. 433 U.S. 584 (1977).

126. Bedau, *supra* note 3, at 1157.

constitutional warrant,"<sup>127</sup> is grounded on the long-standing death penalty for rape, which "cruel and unusual" manifestly did not comprehend.<sup>128</sup>

My alleged indifference "to the relevance of the most obvious facts about the racial impact of the death penalty"<sup>129</sup> for rape, leads Bedau to cry out:

Is there no *law* in this nation that would prohibit a racist state legislature and criminal justice system from practicing and upholding racially-biased prosecutions, trials, and sentences for the crime of rape? Is there no *justice* under law for convicted offenders who would forfeit their lives rather than merely their liberty solely because of their race?<sup>130</sup>

What was the "law"? In the words of Thaddeus Stevens, the 1866 framers sought to assure that, "Whatever law punishes a white man for a crime shall punish the black man precisely in the same way." Stevens "referred," in Bedau's terminology, to the Black Codes, saying, "I need not enumerate these partial and oppressive *laws*."<sup>131</sup> Such statutes, Kenneth Stampp wrote, "made certain acts felonies when committed by Negroes but not when committed by whites. . . . [T]hey assigned heavier penalties to Negroes than whites convicted of the same offense."<sup>132</sup> That there was no intention to interfere with traditional state control of juries is demonstrated by the framers' *exclusion of blacks from juries*.<sup>133</sup> Given a bar against Negro participation in the jury process—participation being the best possible safeguard against discrimination—it is difficult to assume that the framers provided for even more far reaching intervention in the states' jury processes, particularly when in many states the Negro presence was negligible. The framers sought to ensure access to the courts, to a fair trial,<sup>134</sup> so that an innocent black would not be railroaded to death. But to posit that they also meant to save an undeniably guilty murderer or rapist from the death penalty because a white was sentenced to imprisonment is to ignore the racism

127. *Id.* (quoting R. BERGER, *supra* note 4, at 173). Justice Powell pointed out that the "same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms," *Furman v. Georgia*, 408 U.S. 238, 447 (1972) (Powell, J., dissenting), but the abolitionists are not so much concerned with curing discrimination as with total abolition of the death penalty.

128. By 1500 English law recognized eight major capital crimes including murder and rape. H. BEDAU, *supra* note 68, at 1. The Massachusetts Bay Colony made rape a capital offense in 1636, *id.* at 5, and by 1785 Massachusetts had "nine capital crimes" including murder and rape. *Id.* at 6. At the adoption of the Constitution the colonies recognized "from ten to eighteen capital offenses" including "arson, rape, robbery, burglary and sodomy." *Woodson v. North Carolina*, 428 U.S. 280, 289 n.16 (1976).

129. Bedau, *supra* note 3, at 1157. In fact, I discuss the issue of racial discrimination, R. BERGER, *supra* note 4, at 53–58, but my discussion is inadequate in Bedau's eyes.

130. Bedau, *supra* note 3, at 1158 (emphasis in original).

131. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (emphasis added).

132. K. STAMPP, *THE PECULIAR INSTITUTION* 210 (1956).

133. William Lawrence of Ohio said of the Civil Rights Act of 1866, which was considered to be "identical" with the fourteenth amendment that was to shield it from repeal (for citations, see R. BERGER, *supra* note 84, at 22–23): "[I]t does not affect the right to sit on juries. That it leaves to the States to be determined each for itself." CONG. GLOBE, 39th Cong., 1st Sess. 1852 (1866). For additional citations, see R. BERGER, *supra* note 84, at 163. Dissenting in part from *Ex parte Virginia*, 100 U.S. 339 (1879), Justice Field correctly stated that provision for Negro jurors was "a change so radical . . . [as] was never contemplated by the recent amendments." *Id.* at 362–63 (Field, J., dissenting in part).

134. Respecting fair trials, Bedau comments, "Even on the basis of my own first-hand experiences, admittedly very slender, I would find it impossible to use such words with the glibness that [Berger] does." Bedau, *supra* note 3, at 1159. If trials of blacks are indeed unfair, the phalanx of Bedau's allies should find the unfairness far easier to prove than to prove that death penalties are barred by the "cruel and unusual" punishments clause.

that ran deep in the North.<sup>135</sup> The North was not ready to surrender the states' control of criminal justice administration which was reserved to it by the tenth amendment,<sup>136</sup> an amendment that does not figure in Bedau's litany.

What thus far has rested on reasoning from historical data now has the imprimatur of the Supreme Court, whose right to rewrite the Constitution Bedau so zealously upholds. On January 23, 1984, the Court held in *Pulley v. Harris*,<sup>137</sup> by a vote of seven to two, that the Constitution does not require a state to conduct a special review to insure that a death sentence is in line with other sentences imposed in the state for similar crimes. The Court stated that "[a]ny capital sentencing scheme may occasionally produce aberrational outcomes."<sup>138</sup>

Instead of meeting my analysis, Bedau substitutes indignation. For example, I stated, "[W]ere the issue submitted to the people, they would not, I hazard, abandon the penalty because a black murderer, found guilty beyond a reasonable doubt after a fair trial, is sentenced to death, whereas from time to time a white murderer is not."<sup>139</sup> Bedau asks, "Is this supposed to be testimony to the fair-mindedness of 'the people,' rather than the *indictment* it appears to be?"<sup>140</sup> I am not prepared to "indict" the American people, even though their persistent racism is deplorable.<sup>141</sup> But it is not given to academic illuminati to override their will; nor does the Constitution lodge that power in the Court. The evidence that "black people"—"black Americans—do not favor capital punishment"<sup>142</sup> does not tilt the scales. They comprise circa eleven percent of the population and cannot impose their will on the rest. When Bedau derides my preference for the "tyranny of majorities, recourse to the ballot box,"<sup>143</sup> he is unfaithful to the basic principle of our democracy—rule by the majority<sup>144</sup> save where its will is circumscribed by the Constitution. His distrust of

135. Derrick Bell, a black academician, wrote, "[F]ew abolitionists were interested in offering blacks the equality they touted so highly." Bell, Book Review, 76 COLUM. L. REV. 350, 358 (1976). "Racism," David Donald, a Reconstruction historian, remarked, "ran deep in the North," and the suggestion that "Negroes should be treated as equal to white men woke some of the deepest and ugliest fears in the American mind." D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 202, 157 (1970).

136. In THE FEDERALIST No. 17, at 103 (A. Hamilton) (mod. lib. ed. 1937), Hamilton stressed the "one transcendent advantage belonging to the province of state governments, . . . the ordinary administration of criminal and civil Justice." In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), Justice Miller declared, "[O]ur statesmen have still believed that the existence of the States with powers for domestic and local government . . . was essential." *Id.* at 82. For additional citations, see R. BERGER, *supra* note 4, at 26-27; see also *supra* text accompanying note 83.

137. 104 S. Ct. 871 (1984).

138. *Id.* at 881.

139. R. BERGER, *supra* note 4, at 58.

140. Bedau, *supra* note 3, at 1159 (emphasis added). Henry Monaghan derides an approach that is no more than asking, "Is this what America stands for?" Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 396 (1981).

141. Dr. Kenneth B. Clark, whose studies of the pernicious effects of segregation of black children were cited by the Supreme Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), recently stated:

I believed in the 1950's that a significant percentage of Americans were looking for a way out of the morass of segregation. It was wishful thinking. It took me 10 to 15 years to realize that I seriously underestimated the depth and complexity of Northern racism. . . . We haven't found the way of dealing with discrimination in the North.

Goodman, *Dr. Kenneth B. Clark: Bewilderment Replaces "Wishful Thinking" on Race*, N.Y. Times, Dec. 27, 1984, at A8, col. 1.

142. Bedau, *supra* note 3, at 1159.

143. *Id.* at 1158.

144. Gordon Wood notes "the consuming majoritarian character of Revolutionary thought." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 64 n.40 (1969).



the ballot box overlooks the political "swing" impact of increasing black voting strength.<sup>145</sup> That path is slow, but it is preferable to imposing Bedau's will on an unwilling public.<sup>146</sup> If the ballot box fails, that does not authorize the Court to take over. That is the essence of the constitutional issue so powerfully stated by Philip Kurland: "[T]he most immediate constitutional problem of our present time [is] the usurpation by the judiciary of general governmental power on the pretext that its authority derives from the Fourteenth Amendment."<sup>147</sup>

The proposition that the Court may only exercise power constitutionally conferred is derisively converted by Bedau into a thesis that the Constitution "required the Supreme Court" to ignore "the racist character of our society."<sup>148</sup> The inescapable fact, however, is that the framers of the fourteenth amendment did not grant plenary power over racism but made a quite limited grant, far from a blank check to transform our society.<sup>149</sup> In its recent homily in the legislative veto case, the Court stated: "The hydraulic pressure inherent in each of the separate branches to exceed the outer limits of its power, *even to accomplish desirable objectives* must be resisted. . . . [T]o maintain the separation of powers, the carefully defined limits on the power of each branch *must not be eroded*."<sup>150</sup>

### III. CONCLUSION

A "philosopher" who boldly sets out to teach a veteran lawyer *How Not to Read the Constitution* should bring more legal learning to the task. Instead, Bedau is woefully uninformed on governing law and illustrates afresh the wisdom of the folk-saying "shoemaker stick to your last." More distasteful is his pervasive self-

145. Delaney, *Voting: The New Black Power*, N.Y. Times, Nov. 27, 1983, (Magazine), at 34.

146. W. H. Auden wrote, "[F]rom their experience under the Protectorate, Englishmen learned . . . [that] the claim of self-appointed saints to know by divine inspiration what the good life should be and to have the right to impose their will on the ungodly could be as great a threat as the divine right of kings." SIDNEY SMITH, *SELECTED WRITINGS* xvi (W. Auden ed. 1956).

147. Letter from Philip Kurland to Harvard University Press (Aug. 15, 1977).

148. Bedau, *supra* note 3, at 1158. "The legislative history of the 1866 [Civil Rights] Act clearly indicates that Congress intended to protect a limited category of rights. . . ." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). Justice Bradley declared in 1870 that "the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment. . . . [T]he first section of the bill covers the same ground as the fourteenth amendment." *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408). Bradley summed up in *The Civil Rights Cases*, 109 U.S. 3 (1883), that the 1866 Act sought to secure

those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts to sue . . . to inherit, purchase . . . property, as is enjoyed by white citizens. [C]ongress did not assume . . . to adjust what may be called social rights of men . . . but *only* to declare and vindicate those fundamental rights. . . .

*Id.* at 72 (emphasis added).

149. See *supra* note 148 and R. BERGER, *supra* note 84, at 117-33. For activist acceptance of the history demonstrating the exclusion of segregation from the fourteenth amendment, see Abraham, "Equal Justice Under Law" or "Justice at any Cost"? *The Judicial Role Revisited: Reflections on Government by Judiciary: The Transformation of the Fourteenth Amendment*, 6 HASTINGS CONST. L.Q. 467 (1979); Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 292 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983).

150. *INS v. Chadha*, 103 S. Ct. 2764, 2764 (1983) (emphasis added). Addressing effectuation of the individual sense of justice, Cardozo wrote, "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 136 (1921).

righteousness, as if he had descended from the Mount bearing the one and only moral law.<sup>151</sup> Yet he formerly wrote that the retribution "theory has been defended by secular saints like G. E. Moore and Immanuel Kant, whose dispassionate interest in justice cannot reasonably be challenged."<sup>152</sup> Among those who have defended capital punishment are Montesquieu, Locke, Rousseau, Mill, Sir James Fitzjames Stephen, Jacques Barzun, Arthur Goodhart, and Sidney Hook.<sup>153</sup> Bedau has yet to learn from Cardozo that "[n]ot all the precepts of conduct precious to the hearts of many of us are immutable principles of justice."<sup>154</sup>

Although Bedau cries out for a "law," he does not really want *law*. Rather he wants effectuation of his predilections. Consider his resentment that *Gregg v. Georgia*<sup>155</sup> did not go far enough: "Hidden beneath the veneer of constitutional argument is the plain evidence that the Court has proved itself arbitrary and discriminatory in its defense of the death penalty";<sup>156</sup> an abolitionist's confession that what counts is fulfillment of his demands, bother the "veneer of constitutional argument." For Bedau, halting the execution of "a thousand" indubitably guilty murderers outweighs the preservation of constitutional limits on power, without which Washington cautioned, the democracy itself may be destroyed.<sup>157</sup> For me, those limits are of paramount importance: they serve as a bulwark against oppression and protect the right of the people to govern themselves. *That* is the issue between us, not whether death penalties are socially and morally wrong. A constitution that judges may revise in accordance with their individual preferences is writ on water.<sup>158</sup>

151. In a letter to Harold Laski on October 24, 1930, Justice Holmes wrote, "I came to loathe in the Abolitionists . . . the conviction that anyone who did not agree with them was a knave or a fool." 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 129 (M. Howe ed. 1953).

152. H. BEDAU, *THE DEATH PENALTY IN AMERICA* 148-49 (2d ed. 1968).

153. For citations, see R. BERGER, *supra* note 4, at 69, 175 n.2. Arthur Goodhart wrote, "There seems to be an instinctive feeling in most ordinary men that a person who has done an injury to others should be punished for it. . . . [W]ithout a sense of retribution we may lose our sense of wrong." A. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 92-93 (1953). That sentiment was shared by Justice Stewart, speaking for the plurality in *Furman v. Georgia*, 408 U.S. 238 (1972):

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

*Id.* at 308 (Stewart, J., concurring). These citations are merely designed to show that what Bedau views with horror is regarded quite differently by men of no less stature.

154. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). "It is a misfortune," Holmes said, "if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong." O. HOLMES, *COLLECTED LEGAL PAPERS* 295 (1920).

155. 428 U.S. 153 (1976).

156. H. BEDAU, *supra* note 21, at 118. Bedau also lamented that the Justices "have put aside their personal scruples against the death penalty in the name of federalism [and] judicial restraint," *id.* at 119, an astonishing upside-down view of the judicial function. "Federalism," basic to our constitutional structure, must yield to the "personal scruples" of the Justices!

157. Let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

35 GEORGE WASHINGTON, *WRITINGS* 228-29 (J. Fitzpatrick ed. 1940).

158. See *supra* note 150 and text accompanying note 81.

Bedau should take to heart Confucius' wise counsel: "he who thinks the old embankments useless, and destroys them, is sure to suffer from desolation caused by overflowing water."<sup>159</sup>

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159. W. DURANT, *OUR ORIENTAL HERITAGE* 673 (16th ed. 1954). "Nothing can destroy a government more quickly than its . . . disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

